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Supreme Court of the United States

OCTOBER TERM, 1929

No. 364

GREAT NORTHERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, AND FARMERS GRAIN AND SHIPPING COMPANY, Plaintiffs,

v.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, AND C. W. McDONNELL, FAY HARDING AND BEN C. LARKIN AS MEMBERS OF AND CONSTITUTING SAID BOARD, AND JAMES MORRIS AS ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, Defendants.

STATEMENT DISCLOSING BASIS ON WHICH THE SUPREME COURT HAS JURISDICTION TO REVIEW ON APPEAL.

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GREAT NORTHERN RAILWAY COMPANY, NORTHERN PACIFIC RAILWAY COMPANY, MINNEAPOLIS, ST. PAUL & SAULT STE. MARIE RAILWAY COMPANY, CHICAGO, MILWAUKEE, ST. PAUL & PACIFIC RAILROAD COMPANY, AND FARMERS GRAIN AND SHIPPING COMPANY, Plaintiffs,

v.

BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA, AND C. W. McDONNELL, FAY HARDING AND BEN C. LARKIN AS MEMBERS OF AND CONSTITUTING SAID BOARD, AND JAMES MORRIS AS ATTORNEY GENERAL OF THE STATE OF NORTH DAKOTA, Defendants.

STATEMENT DISCLOSING BASIS ON WHICH THE SUPREME COURT HAS JURISDICTION TO REVIEW ON APPEAL.

Now come the above named defendants and state to the Court that the Supreme Court of the United States has jurisdiction to review the above entitled action on appeal from the District Court of the United States for the District of North Dakota, Southwestern Division, upon and for the following grounds:

A.

Jurisdiction is sustained upon appeal by the following statutory provision.

"No interlocutory injunction suspending or restraining the enforcement, operation, or execution of any statute of a State by restraining the action of any officer of such State

in the enforcement or execution of such statute, or in the enforcement or execution of an order made by an administrative board or commission acting under and pursuant to the statutes of such state, shall be issued or granted by any Justice of the Supreme Court, or by any district thereof, or by any circuit judge acting as district judge, upon the ground of the unconstitutionality of such statute, unless the application for the same shall be presented to a Justice of the Supreme Court of the United States, or to a circuit or district judge, and shall be heard and determined by three judges, of whom at least one shall be a justice of the Supreme Court or a circuit judge, and the other two may be either circuit or district judges, and unless a majority of said three judges shall concur in granting such application.**** An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case.****"
U. S. C. A. Title 28, Paragraph 380.

B.

The decree herein from which this appeal is taken was entered in the office of the Clerk of the District Court of the United States for the District of North Dakota, Southwestern Division, on the 9th day of July, A. D. 1929. (Original record page_____.)

The application for appeal herein was presented to the Honorable Andrew Miller, District Judge, on the 30th day of July, 1929, and was on said date allowed. (Original record page_____.)

C.

STATEMENT OF THE NATURE OF THE CASE AND THE RULINGS BELOW WHICH BRING THE CASE WITHIN THE JURISDICTIONAL PROVISION RELIED ON.

This case is an action brought by the plaintiffs under the Commerce Clause of the Constitution of the United States and the Fourteenth Amendment thereof and the Act of Congress known as the Interstate Commerce Act (Bill of Complaint, Paragraph 1), to enjoin the defendants from putting into effect and enforcing an Order of the Board of Railroad Commissioners of the State of North Dakota dated May 8, 1929, which Order establishes a scale of distributing or jobbing freight rates between seventeen designated points in North Dakota and between these points and all other points within the State of North Dakota. The effective

date of said Order of May 8th was by said Board of Railroad Commissioners postponed until July 12, 1929. On July 9, 1929, and before said Order became effective, the United States District Court, consisting of one Circuit Judge and two District Judges sitting in banc, under the statute above quoted, granted an interlocutory injunction in the following terms:

The motion of plaintiffs for an interlocutory injunction in this case having come on regularly to be heard on the 2nd day of July, 1929, by the Honorable A. K. Gardner, Circuit Judge, and the Honorable Andrew Miller and the Honorable John B. Sanborn, District Judges, in the Federal Court Room in the City of St. Paul, Minnesota; and it appearing that five days' notice of said hearing has been duly given to the Governor and the Attorney General of the State of North Dakota and to the defendants in this case, as provided by law, and that the plaintiffs and defendants have filed a stipulation in writing that said motion may be heard at the City of St. Paul, Minnesota; and the Court having heard the arguments of counsel for plaintiffs and defendants and being fully advised in the premises,

And it appearing to the satisfaction of the Court that the establishment of the scale of distributing or jobbing class rates required by the order of May 8, 1929, of the Board of Railroad Commissioners of North Dakota in Case No. 2255 and Case No. 2875, will result in rates substantially below the interstate class rates applying to and from North Dakota for similar services; that there are now proceedings pending before the Interstate Commerce Commission in which the plaintiffs herein and the defendant board have participated and in which said Interstate Commerce Commission will determine whether the disparities between said interstate rates and the intrastate rates required by said order of May 8, 1929, result in an unjust discrimination against and burden upon interstate commerce in violation of Section 13 of the Interstate Commerce Act; that if plaintiffs are required to establish the intrastate rates required by said order to be made effective July 12, 1929, and if the Interstate Commerce

Commission later determines in said proceedings that said reduced intrastate rates are unreasonably low and that their establishment and collection results in such unjust discrimination against interstate commerce plaintiffs will suffer large revenue losses prior to such determination by the Interstate Commerce Commission and will be irreparably damaged and an unlawful burden will be placed on interstate commerce; that if said order is enjoined until the Interstate Commerce Commission determines said questions such irreparable damage will be avoided and shippers and receivers of traffic moving on North Dakota intrastate class rates subsequent to July 12, 1929, will be in position to recover the difference between the present rates and those prescribed in said order if the Interstate Commerce Commission later determines that the distributing or jobbing rates required by said order of May 8, 1929, do not result in unjust discrimination against interstate commerce; that unless said intrastate rates are enjoined plaintiffs have no plain, adequate or complete remedy at law; and that if said order is not complied with plaintiffs will be subjected to numerous proceedings and prosecutions both for equitable and mandatory relief and to a multiplicity of penalties and fines, although the Interstate Commerce Commission shall later determine that said intrastate rates result in an unjust discrimination against interstate commerce;

IT IS THEREFORE HEREBY ORDERED that the said Board of Railroad Commissioners of the State of North Dakota, and C. W. McDonnell, Fay Harding and Ben C. Larkin as members of said Board, and James Morris as Attorney General of the State of North Dakota, and their successors in office and their servants, employees, agents and all persons acting under the control or authority of any and all of said defendants, be, and each of them hereby is, enjoined and restrained from putting into effect or enforcing, or attempting to put into effect or to enforce, the scale of distributing or jobbing class rates prescribed by the order of May 8, 1929, of the Board of Railroad Commissioners of the State of North Dakota in Case No. 2255 and Case No. 2875, and from instituting any action or proceeding of any sort whatsoever to enforce said scale of dis-

tributing or jobbing class rates or to hinder or obstruct the charging or collecting by plaintiffs of the existing scale of class rates for transportation between points in the State of North Dakota, and from instituting any proceeding to subject plaintiffs to any penalties for failure to comply with the said provisions of said order of May 8, 1929, and from ordering, seeking, aiding or abetting in any manner whatever any person to commit any or either of the acts aforesaid.

AND IT IS FURTHER HEREBY ORDERED that the said defendants, and each of them, are so enjoined and restrained until the Interstate Commerce Commission has determined, either in its Docket 17,000, Part 2, now pending for decision, or in the proceeding under Section 13 of the Interstate Commerce Act which the plaintiffs herein have petitioned the Interstate Commerce Commission to institute, the question of whether the establishment and collection of the intrastate distributing or jobbing scale of class rates prescribed in said order of May 8, 1929, causes any undue or unlawful advantage, preference or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or in undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and until the further order of this Court.

AND IT IS FURTHER ORDERED that a copy hereof be served upon each of the defendants and that from and after the date of service each and all of said defendants shall observe and comply herewith.

AND IT IS FURTHER ORDERED that this interlocutory injunction shall become effective upon the filing of bonds in the aggregate amount of $150,000.00 in favor of the United States of America, for the benefit of those affected by the injunction, as follows, to-wit:

By the Great Northern Railway Company in the penal sum of Forty-five Thousand Dollars ($45,000.00);

By the Northern Pacific Railway Company in the penal sum of Forty-five Thousand Dollars ($45,000.00);

By the Minneapolis, St. Paul & Sault Ste. Marie Railway Company in the penal sum of Thirty Thousand Dollars ($30,000.00);

By the Chicago, Milwaukee, St. Paul & Pacific Railroad Company in the penal sum of Twenty Thousand Dollars ($20,000.00);

By the Farmers Grain and Shipping Company in the penal sum of Ten Thousand Dollars ($10,000.00);

such bonds to be conditioned that, if it shall be determined that the rates fixed by the order of May 8, 1929, were lawful rates, said plaintiffs will make refunds of the difference between what intrastate shippers have been required to pay and what they would have paid if an injunction had not been granted.

Dated this 9th day of July, 1929. (Original record page_____)

D.
CITATIONS

Phoenix Railway Company of Arizona vs. W. Paul Geary, Frank A. Jones and Amos W. Cole, Members of the Corporation Commission of the State of Arizona, et al. 239 U. S. 277. 60 L. ed. 287.

Jackson vs. Cravens. 238 Fed. 117.

Dated this 17th day of September, 1929.

Respectfully submitted,

/ JAMES MORRIS,
Attorney General and
Attorney for Defendants.

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IN THE

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OCTOBER TERM, 1929

No. 364

Board of Railroad Commissioners of the State of North Dakota, and C. W. McDonnell, Fay Harding and Ben C. Larkin as members of and constituting said Board, and James Morris as Attorney General of the State of North Dakota,

Appellants,

vs.

Great Northern Railway Company, Northern Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and Farmers Grain and Shipping Company,

Appellees.

APPELLANT'S BRIEF

JAMES MORRIS,
Attorney General,
Bismarck, North Dakota.

JOHN E. BENTON,
603-606 Otis Building,
Washington, D. C.
Attorneys for Appellants.

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IN THE

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No. 364

Board of Railroad Commissioners of the State of North Dakota, and C. W. McDonnell, Fay Harding and Ben C. Larkin as members of and constituting said Board, and James Morris as Attorney General of the State of North Dakota,
Appellants,

vs.

Great Northern Railway Company, Northern Pacific Railway Company, Minneapolis, St. Paul & Sault Ste. Marie Railway Company, Chicago, Milwaukee, St. Paul & Pacific Railroad Company, and Farmers Grain and Shipping Company,
Appellees.

APPELLANT'S BRIEF

REFERENCE TO OPINION BELOW

The opinion below, in the United States District Court for the District of North Dakota, is reported **Great Northern Ry. Co. et al. v. Board of Railroad Comm'rs of State of North Dakota et al.**, 33 Fed. 2d Series, 934.

STATEMENT OF GROUND OF JURISDICTION INVOKED

Jurisdiction to review the judgment below exists under Section 266 of the Judicial Code.

STATEMENT OF FACTS

This is an appeal to the Supreme Court of the United States from an order of the District Court of the United States for the District of North Dakota dated July 9, 1929, which order was in the form of an interlocutory injunction enjoining the

Board of Railroad Commissioners of the State of North Dakota and C. W. McDonnell, Fay Harding and Ben C. Larkin, as members of said Board, and James Morris as Attorney General of the State of North Dakota from putting into effect a scale of distributing or jobbing class rates prescribed by an order of the Board of Railroad Commissioners of the State of North Dakota dated May 8, 1929.

The facts leading up to the issuance of said interlocutory injunction are as follows:

On May 29, 1925, the Board of Railroad Commissioners of the State of North Dakota upon its own motion instituted a proceeding before that Commission known as case No. 2255 for the purpose of determining to what extent, if any, the North Dakota intrastate rates for transportation of freight might be unjust, unreasonable, unjustly discriminatory or unduly preferential. Hearings were had and on September 2, 1927, it appearing that the Interstate Commerce Commission was conducting a class rate investigation, being a part of Rate Structure Investigation, Docket 17,000, the State Commission held its record open for further hearing. (R. 17) On January 28, 1928, the State Commission reopened case No. 2255, insofar as it related to class rates and certain other rates, and set that proceeding down for hearing in connection with a hearing in its suspension proceeding, case No. 2875. On May 8, 1929, the State Commission issued the order which is the occasion of the present controversy, (R. 15) which order prescribed the things about which the appellees complain, namely:

> "3. That for the future, between all jobbing or distributing points, including Bismarck, Carrington, Devils Lake, Dickinson, Drake, Fairmount, Fargo, Grand Forks, Jamestown, Mandan, Max, Minot, New Rockford, Oakes, Valley City, Wahpeton and Williston, also between such points on the one hand and all other points on the other hand, reasonable and non-discriminatory single line class rates shall not be in excess of 90% of the current single line general distance class rates.

Joint rates shall be made by the addition of the following arbitraries in cents per 100 lbs.:

Classes	1	2	3	4	5	A	B	C	D	E
Arbitraries	8	7	6	5	3	3	3	2	2	1.

5. That the jobbing scales prescribed herein shall be applied concurrently from and to all jobbing points.

8. That all rates prescribed herein shall be the maximum at directly intermediate points. A longer line or longer lines may meet the rates of the shorter line or shorter lines, but shall observe such rates as maximum at intermediate points." (R. 20 and 21)

By supplemental orders, the effective date of the order of May 8, 1929, was finally fixed at July 12, 1929.

On June 25, 1929, the appellees filed a Bill of Complaint (R. 1) in the District Court of the United States for the District of North Dakota in which the then plaintiffs and now appellees sought to enjoin the appellants from putting into effect "said order of May 8, 1929, insofar as it relates to the establishment of a jobbing or distributing scale of class rates". (R. 13) and further asking.

"That an interlocutory injunction be issued restraining the defendants, and each of them, as prayed, during the pendency of this action; and that a temporary restraining order be issued restraining the defendants, and each of them, until the hearing and determination of the application for an interlocutory injunction." (R. 14)

The appellees also asked for an interlocutory injunction. The motion for the interlocutory injunction was heard on July 2, 1929, before Hon. A. K. Gardner, Circuit Judge, and Hon. Andrew Miller and Hon. John B. Sanborn, District Judges, sitting pursuant to paragraph 383, Title 28, U. S. C. A. The appellants resisted the application for an interlocutory injunction and filed their answer (R. 38) and presented in support thereof affidavit of Neal E. Williams, Traffic Expert of Fargo, North Dakota, (R. 52) affidavit of T. A. Durrant, Traffic Expert of Grand Forks, North Dakota, (R. 58) affidavit of G. M. Springer, Traffic Expert of Jamestown, North Dakota, (R. 76) and affidavit of E. M. Hendricks, Traffic Expert and Advisor

of the State Commission. (R. 51) The appellees presented the affidavits of James G. Morrison (R. 78) and P. B. Beidelman. (R. 83) in rebuttal.

The Court heard arguments of counsel, took the matter under advisement, and on July 6, 1929, issued its decision, (R. 84) and on July 9, 1929, issued its interlocutory injunction (R. 88) in the following terms:

> "The motion of plaintiffs for an interlocutory injunction in this case having come on regularly to be heard on the 2nd day of July, 1929, by the Honorable A. K. Gardner, Circuit Judge, and the Honorable Andrew Miller and the Honorable John B. Sanborn, District Judges, in the Federal Court Room in the City of St. Paul, Minnesota; and it appearing that five days' notice of said hearing has been duly given to the Governor and the Attorney General of the state of North Dakota and to the defendants in this case, as provided by law, and that the plaintiffs and defendants have filed a stipulation in writing that said motion may be heard at the City of St. Paul, Minnesota; and the Court having heard the arguments of counsel for plaintiffs and defendants and being fully advised in the premises,
>
> And it appearing to the satisfaction of the Court that the establishment of the scale of distributing or jobbing class rates required by the order of May 8, 1929, of the Board of Railroad Commissioners of North Dakota in Case No. 2255 and Case No. 2875, will result in rates substantially below the interstate class rates applying to and from North Dakota for similar services; that there are now proceedings pending before the Interstate Commerce Commission in which the plaintiffs herein and the defendant board have participated and in which said Interstate Commerce Commission will determine whether the disparities between said interstate rates and the intrastate rates required by said order of May 8, 1929, result in an unjust discrimination against and burden upon interstate commerce in violation of Section 13 of the Interstate Commerce Act; that if the plaintiffs are required to establish the intrastate rates required by said order to be made effective July 12, 1929, and if the Interstate Commerce Commission later determines in said proceedings that said reduced intrastate rates are unreasonably low and that their establishment and collection results in such unjust discrimination against interstate commerce plaintiffs will suffer large revenue

losses prior to such determination by the Interstate Commerce Commission and will be irreparably damaged and an unlawful burden will be placed on interstate commerce; that if said order is enjoined until the Interstate Commerce Commission determines said questions such irreparable damage will be avoided, and shippers and receivers of traffic moving on North Dakota intrastate class rates subsequent to July 12, 1929, will be in position to recover the difference between the present rates and those prescribed in said order if the Interstate Commerce Commission later determines that the distributing or jobbing rates required by said order of May 8, 1929, do not result in unjust discrimination against interstate commerce; that unless said intrastate rates are enjoined plaintiffs have no plain, adequate or complete remedy at law; and that if said order is not complied with plaintiffs will be subjected to numerous proceedings and prosecutions both for equitable and mandatory relief and to a multiplicity of penalties and fines, although the Interstate Commerce Commission shall later determine that said intrastate rates result in an unjust discrimination against interstate commerce;

It is therefore hereby ordered that the said Board of Railroad Commissioners of the State of North Dakota, and C. W. McDonnell, Fay Harding and Ben C. Larkin as members of said Board, and James Morris as Attorney General of the State of North Dakota, and their successors in office and their servants, employes, agents and all persons acting under the control or authority of any and all of said defendants, be, and each of them hereby is, enjoined and restrained from putting into effect or enforcing, or attempting to put into effect or to enforce, the scale of distributing or jobbing class rates prescribed by the order of May 8, 1929, of the Board of Railroad Commissioners of the State of North Dakota in Case No. 2255 and Case No. 2875, and from instituting any action or proceeding of any sort whatsoever to enforce said scale of distributing or jobbing class rates or to hinder or obstruct the charging or collecting by plaintiffs of the existing scale of class rates for transportation between points in the State of North Dakota, and from instituting any proceeding to subject plaintiffs to any penalties for failure to comply with the said provisions of said order of May 8, 1929, and from ordering, seeking, aiding or abetting in any manner whatever any person to commit any or either of the acts aforesaid.

And it is further hereby ordered that the said defendants, and each of them, are so enjoined and restrained

until the Interstate Commerce Commission has determined, either in its Docket 17,000, Part 2, now pending for decision, or in the proceeding under Section 13 of the Interstate Commerce Act which the plaintiffs herein have petitioned the Interstate Commerce Commission to institute, the question of whether the establishment and collection of the intrastate distributing or jobbing scale of class rates prescribed in said order of May 8, 1929, causes any undue or unlawful advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or in undue, unreasonable, or unjust discrimination against interstate or foreign commerce, and until the further order of this Court.

And it is further ordered that a copy hereof be served upon each of the defendants and that from and after the date of service each and all of said defendants shall observe and comply herewith.

And it is further ordered that this interlocutory injunction shall become effective upon the filing of bonds in the aggregate amount of $150,000.00 in favor of the United States of America, for the benefit of those affected by the injunction, as follows, to-wit:

By the Great Northern Railway Company in the penal sum of Forty-five Thousand Dollars ($45,000.00);

By the Northern Pacific Railway Company in the penal sum of Forty-five Thousand Dollars ($45,000.00);

By the Minneapolis, St. Paul & Sault Ste. Marie Railway Company in the penal sum of Thirty Thousand Dollars ($30,000.00);

By the Chicago, Milwaukee, St. Paul & Pacific Railroad Company in the penal sum of Twenty Thousand Dollars ($20,000.00);

By the Farmers Grain and Shipping Company in the penal sum of Ten Thousand Dollars ($10,000.00);
such bonds to be conditioned that, if it shall be determined that the rates fixed by the order of May 8, 1929, were lawful rates, said plaintiffs will make refunds of the difference between what intrastate shippers have been required to pay and what they would have paid if an injunction had not been granted.

Dated this 9th day of July, 1929.

Archibald K. Gardner, U. S. Circuit Judge. Andrew Miller, U. S. District Judge. John B. Sanborn, U. S. District Judge."

The Board of Railroad Commissioners of the State of North Dakota is by Section 4729, Compiled Laws N. D. 1913, vested with the following power:

"The board of railroad commissioners shall have power to prescribe just and reasonable classifications of freight and to fix and prescribe just and reasonable schedules of charges for the transportation of intrastate freight and intrastate passengers, for sleeping car accommodations, for goods and all matter of every kind carried by express companies within this state, for the transmission of messages by telegraph and telephone companies and for the use of telephone lines within the state. The commissioners shall also have the power to make just and reasonable regulations for the apportionment of all such charges between two or more companies jointly engaged in the transportation of freight, passengers, express matter, telegraph or telephone messages and it shall be the duty of said commissioners to prepare such schedules and classifications; and said schedules so made by said commissioners shall in all suits brought against any such railroad, railroad corporation or common carriers, wherein is in any way involved the charges of any such railroad, railroad corporation or common carriers, for the transportation of any passenger, freight property or cars or unjust discrimination in relation thereto, be deemed and taken in all courts of this state as prima facie evidence that the rates therein fixed are reasonable and just maximum rates or charges for the transportation of passengers, freight, property and cars upon railroads or the transmission of messages by telephone or telegraph for which said schedules may have been respectively prepared. Said commissioners shall from time to time, but not oftener than once in six months, unless upon appeal from the order fixing such rate the court should modify or reverse such order, and then only to the extent made necessary by such modification or reversal, change and revise said schedules. When any schedule shall have been made or revised as aforesaid, it shall be the duty of said commissioners to forthwith serve a copy of said schedule upon such railroad, railroad corporation or common carrier affected thereby and a notice stating when such schedule shall go into effect, and to cause notice thereof to be published for two successive weeks in one public newspaper published in each judicial district in this state which notice shall state the fact that a new schedule has been made and the date of the taking effect of said schedule; and said schedule shall take ef-

fect at the time so stated in such notice and a printed copy of said revised schedule shall be conspicuously posted by such railroad, railroad corporation or common carrier in each freight, express or receiving office and passenger depot upon its line or lines. All such schedules, so made, shall be received and held in all such suits as prima facie the schedule of said commissioners without further proof than the production of the schedule desired to be used as evidence, with a certificate of said commissioners of railroads, that the same is a true copy of the schedule prepared by them for the railroad, railroad corporation or common carrier therein named, and that notice of the making of the same has been published as required by law, provided, that before finally fixing and deciding what the original maximum rates and classifications shall be, it shall be the duty of the commissioners of railroads to cause notice of such meeting to be given each common carrier affected thereby by mailing a notice thereof addressed to the managing officer thereof at the address given in the last report of such common carrier to the secretary of state, or to such address as may have been given to and filed with said commission, at least thirty days before the date of said hearing, and to publish ten days' notice in two daily papers published in the state setting forth in such notice that at a certain time and place they will proceed to fix and determine such maximum rates and classifications; and they shall at such time and place and as soon as practicable afford to any person, firm, corporation, railroad, railroad corporation or common carrier who may desire it, an opportunity to make an explanation or showing or to furnish information to said commissioners on the subject of determining and fixing such maximum rates, fares and classifications; and a schedule of rates, fares and classifications of freights or property on all lines of railroad, railroad corporations or common carriers, subject to this article in North Dakota shall be fixed within sixty days from the taking effect of this article."

SPECIFICATION OF ERRORS

I.

The Court erred in finding and deciding that the enforcement of the order of the Board of Railroad Commissioners of the State of North Dakota dated May 8, 1929, will result in rates substantially below interstate class rates applying to and from North Dakota for similar services.

II.

The Court erred in finding and deciding that the plaintiffs will be irreparably damaged by the enforcement of the defendant, Board of Railroad Commissioners' Order of May 8, 1929.

III.

The Court erred in finding and deciding that there are now pending before the Interstate Commerce Commission proceedings in which the plaintiffs herein and the defendant, Board of Railroad Commissioners, have participated in which said Interstate Commerce Commission will determine whether the disparities between said interstate rates and the intrastate rates required by said order of May 8, 1929, result in an unjust discrimination against and burden upon interstate commerce in violation of Section (fols. 114-117) of the Interstate Commerce Act.

IV.

That the Court erred in finding and deciding that the enforcement of said order of May 8, 1929, will or might result in an unlawful burden upon interstate commerce.

V.

That the Court erred in finding and deciding that unless said intrastate rates, as fixed by said order of May 8, 1929, are enjoined, the plaintiffs have no plain, adequate or complete remedy at law.

VI.

That the Court erred in finding and deciding that if said order of May 8, 1929, is not complied with, the plaintiffs will be subjected to numerous proceedings and prosecutions both for equitable and mandatory relief and to a multiplicity of penalties and fines, although the Interstate Commerce Commission shall later determine that said intrastate rates shall result in an unjust discrimination against interstate commerce.

VII.

That the Court erred in enjoining and restraining the defendants and appellants until the Interstate Commerce Com-

mission has made a determination, either in its Docket 17,000, Part 2, now pending for decision, or in the proceedings under Section 13 of the Interstate Commerce Act, or until the further order of the Court.

VIII.

That the Decree granting said interlocutory injunction is contrary to law.

ARGUMENT

SUMMARY OF POINTS ARGUED

The following summary of points relied upon and to be argued herein are the same as set forth on page 95 of the record, but the same are here presented in different order from that in which they are there set forth:

I.

The pendency of a proceeding before the Interstate Commerce Commission under the Hoch-Smith Resolution known as Docket 17,000, Part 2, is not ground for and does not give the Court jurisdiction to grant an interlocutory injunction.

II.

The pendency before the Interstate Commerce Commission of a proceeding under Section 13 of the Interstate Commerce Act involving the order of the Board of Railroad Commissioners of May 8, 1929, is not ground for an injunction and does not give the Court jurisdiction to grant an interlocutory injunction.

III.

The discretion of the Board of Railroad Commissioners in fixing intrastate rates should not be interfered with by the Courts in the absence of a finding by the Interstate Commerce Commission to the effect that such intrastate rates cast a discriminatory burden upon interstate commerce or discriminate against persons or places engaged in interstate commerce.

IV.

The order of the Railroad Commission of the State of North Dakota dated May 8, 1929, will not result in an unlawful burden upon interstate commerce.

V.

The plaintiffs had at the time of the commencement of this action a plain, adequate and complete remedy at law in the Courts of the State of North Dakota.

I.

THE PENDENCY OF A PROCEEDING BEFORE THE INTERSTATE COMMERCE COMMISSION UNDER THE HOCH-SMITH RESOLUTION KNOWN AS DOCKET 17,000, PART 2, IS NOT GROUND FOR AND DOES NOT GIVE THE

COURT JURISDICTION TO GRANT AN INTERLOCUTORY INJUNCTION.

It is not denied that the Board of Railroad Commissioners of North Dakota has been vested with power, under the laws of that State, to prescribe the rates enforcement of which has been enjoined in this proceeding. The defendant carriers, plaintiffs below, sought the injunction upon the ground (among others) that a certain proceeding known as **Rate Structure Investigation, No. 17,000**, is now pending before the Interstate Commerce Commission ,wherein the relationship of the interstate class rates in North Dakota to intrastate class rates is involved. And the court below granted the injunction upon that sole ground. Upon this point the court said:

> "The position of the defendants is not unreasonable. It is evident, from the recitals in the order of the State Board, that the length of time consumed by the Interstate Commerce Commission in reaching a decision in Docket No. 17,000, has, in the opinion of the State Board, resulted in a denial of justice with respect to the rates in question, and that jobbers at certain jobbing points in the State are believed to be unduly prejudiced because of alleged disparity between intrastate class rates and interstate class rates from outside jobbing points, and that it was in an endeavor to do away with the discrimination believed to exist that the order of May 8th was made. It is conceded—as, of course, it must be—that this court has no power to determine the question as to whether the rates fixed by the order of May 8th do or do not discriminate against interstate commerce, or whether they do or do not create an undue disparity between intrastate and interstate rates. That question is before the Interstate Commerce Commission and it alone has jurisdiction to determine it. It may find that the State Board was well within its rights in doing what was done, or it may find to the contrary. We think, however, in view of the pendency of Docket No. 17,000, that the orderly (fol. 107) and logical way to have the question finally settled is to permit the Interstate Commerce Commission to complete that investigation and file its decision before there shall be an attempt to adjust intrastate class rates even to the extent attempted by the order of May 8th. Such rates, if they prove temporary merely—as the plaintiffs contend they will—will only briefly afford the relief sought and may

ultimately prove more of a disadvantage than otherwise to those for whose benefit they are intended, while at the same time they may cause a substantial loss to the carriers and an undue burden upon interstate commerce. On the other hand, if the rates are lawful—as the defendants claim—and are enjoined, their effectiveness cannot long he postponed in any event, and, to a considerable extent, the injury done by staying their effectiveness can be mitigated by requiring the railroads to make reparation in case it is found that they do not encroach upon interstate commerce and that the State Board was within its rights in fixing them.

We do not pass upon the question as to whether the mere fact that a controversy exists between a carrier and a state rate-making body as to the validity of an intrastate rate alleged to discriminate against interstate commerce, justifies an injunction such as prayed for here, or whether a carrier may, by commencing a proceeding before the Interstate Commerce Commission to test the validity of an intrastate rate under Section 13 of the Interstate Commerce Act, after an order has been made by a state commission fixing such rate, properly call for injunctive relief. Our opinion is, however, that, under the circumstances of this case, this Court can and should for the purpose of preserving the status quo until such time as the Interstate Commerce Commission may complete its investigation and file its decision in Docket No. 17,000, grant an interlocutory injunction restraining the defendants from putting into effect (fol. 108) the order of May 8, 1929, upon the plaintiff's furnishing a bond. ***

If, for any reason, the Interstate Commerce Commission should fail or refuse to decide whether the rates fixed by the order of May 8, 1929, are violative of Section 13 of the Interstate Commerce Act, or to make findings or reach a decision from which that question may be fairly determined, or shall hereafter unreasonably delay determination of that question, the defendants may move for a vacation of the injunction."

It will be seen that the court explicitly recognized the rule, heretofore clearly laid down by this court, in cases hereinafter to be cited, that the question whether rates prescribed by state authority cause undue discrimination against interstate commerce is a question for the preliminary determination of the Interstate Commerce Commission, and not for the courts. But

because of the pendency of No. 17,000, the court enjoined the enforcement of intrastate rates which had been prescribed by state authority in accordance with state law. This was beyond the jurisdiction of the court.

The federal government must derive from the Constitution any power which it may have to interfere with the states in the regulation of their internal commerce. It has been clearly established by decisions of this court that the only limitations upon state power to regulate intrastate rates are these: (1) A state may not prescribe rates which are so low as to amount to a taking of property without just compensation, in violation of the Fourteenth Amendment; and (2) Rates which have been prescribed by state authority must yield to the superior authority of the federal government exerted under the Commerce Clause of the Constitution for the protection of interstate commerce.

The Fourteenth Amendment is self-acting. It requires no legislation to carry it into effect. The Amendment itself provides that "No State shall *** deprive any person of life, liberty, or property, without due process of law." A state statute or other law, such as a rate prescribed by state authority, is ineffective if it will operate to cause confiscation; and the courts have jurisdiction to determine that question in a suit brought to enjoin its enforcement.

The Commerce Clause, however, while it inhibits state action which would place a direct burden upon interstate commerce, as respects the internal commerce of the states, has no other effect than to empower the Congress to legislate, in so far as may be necessary for the effective regulation of interstate and foreign commerce. Under this clause the federal courts have no jurisdiction, as respects intrastate rates, except for the enforcement of some act of Congress. Such rates, lawfully prescribed, may be affected only in the manner and to the extent that Congress by legislation, for the proper protection of interstate commerce, has provided.

The pendency of No. 17,000, therefore, gives to the federal courts no power to enjoin the enforcement of intrastate rates unless, in the exercise of the power derived from the Commerce Clause, Congress has granted to the court jurisdiction, upon the institution of a proceeding such as No. 17,000, to enjoin state action pending the termination of the Commission's inquiry, and the announcement of its decision. No such grant of jurisdiction has been attempted by the Congress.

Rate Structure Investigation, No. 17,000, is a proceeding of investigation which was directed by Public Resolution No. 46, 68th Congress, commonly called the Hoch-Smith Resolution. That resolution is set forth in full in the Commission's order instituting the No. 17,000 proceeding, which is as follows:

"ORDER

At a General Session of the Interstate Commerce Commission, held at its office in Washington, D. C., on the 12th day of March, A. D. 1925.

No. 17,000

RATE STRUCTURE INVESTIGATION

In the Matter of Adjustments in the Rate Structure of Common Carriers Subject to the Interstate Commerce Act, and the Fixing of Rates and Charges

It appearing, That by joint resolution of the Congress approved January 30, 1925, the commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, as follows:

(Public Resolution—No. 46—68th Congress)

(S. J. Res. 107)

Joint Resolution Directing the Interstate Commerce Commission to take action relative to adjustments in the rate structure of common carriers subject to the Interstate Commerce Act, and the fixing of rates and charges.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That it is hereby declared to be the true policy in rate making to be pursued by the Interstate Com-

merce Commission in adjusting freight rates, that the conditions which at any given time prevail in our several industries should be considered in so far as it is legally possible to do so, to the end that commodities may freely move.

That the Interstate Commerce Commission is authorized and directed to make a thorough investigation of the rate structure of common carriers subject to the interstate commerce act, in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential, thereby imposing undue burdens, or giving undue advantage as between the various localities and parts of the country, the various classes of traffic, and the various classes and kinds of commodities, and to make, in accordance with law, such changes, adjustments, and redistribution of rates and charges as may be found necessary to correct any defects so found to exist. In making any such change, adjustment, or redistribution the commission shall give due regard, among other factors, to the general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years to a natural and proper development of the country as a whole, and to the maintenance of an adequate system of transportation. In the progress of such investigation the commission shall, from time to time, and as expeditiously as possible, make such decisions and orders as it may find to be necessary or appropriate upon the record then made in order to place the rates upon designated classes of traffic upon a just and reasonable basis with relation to other rates. Such investigation shall be conducted with due regard to other investigations or proceedings affecting rate adjustments which may be pending before the commission.

In view of the existing depression in agriculture, the commission is hereby directed to effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by that depression, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service: Provided, That no investigation or proceeding resulting from the adoption of this resolution shall be permitted to delay the decision of cases now pending before the commission involving rates on products of agriculture,

and that such cases shall be decided in accordance with this resolution.

Approved, January 30, 1925.

It is ordered, That an investigation of the rate structure of common carriers subject to the interstate commerce act be, and it is hereby, instituted by the commission in order to:

(a) Determine to what extent and in what manner, if any, rates, fares, and charges, and all classifications, regulations, and practices relating thereto, hereinafter for brevity collectively termed rates, of such common carriers for or in respect of the transportation or transmission by such carriers in interstate or foreign commerce of the various classes and kinds of commodities and the various classes of traffic, including freight, passenger, mail, and express, or any other, similar or dissimilar, may be unjust, unreasonable, unjustly discriminatory, unduly preferential, or otherwise in violation of any provision of law, including the joint resolution aforesaid.

(b) Determine to what extent and in what manner, if any, the rates, as above defined, of such common carriers cause undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand, and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce.

(c) Make, in accordance with law, such changes, adjustments, and redistribution of rates, as above defined, as may be found necessary to correct any defects so found to exist, and to determine to what extent, if any, and upon what classes and kinds of commodities or classes of traffic, if any, compensating increases or other changes in rates, as above defined, may and shall lawfully be required or authorized by the commission in order to offset or partially offset such reductions or other changes in rates, as above defined, on other classes or kinds of commodities or classes of traffic, giving due regard, among other factors, to—

(1) The conditions which prevail in the several industries of the country, in so far as it is legally possible to do so, to the end that commodities may freely move;

(2) The general and comparative levels in market value of the various classes and kinds of commodities as indicated over a reasonable period of years;

(3) A natural and proper development of the country as a whole;

(4) The maintenance of an adequate system of transportation;

(5) Any other requirement of law laid upon the commission in respect of the initiation, modification, establishment, or adjustment of rates, as above defined.

(d) Make in the progress of the investigation such decisions and orders as the commission may find necessary or appropriate upon the record then made in order to place the rates upon designated classes or kinds of commodities or classes of traffic upon a just and reasonable basis with relation to other rates.

(e) Effect with the least practicable delay such lawful changes in the rate structure of the country as will promote the freedom of movement by common carriers of the products of agriculture affected by the existing depression declared in said joint resolution, including livestock, at the lowest possible lawful rates compatible with the maintenance of adequate transportation service.

It is further ordered, That all common carriers subject to the interstate commerce act be, and they are hereby, made respondents to this proceeding; that this order be served upon each of said respondents; that the several States of the United States be notified of this proceeding by sending copies of this order by registered mail to the governor of each State, as well as to the tribunal thereof, if any, having regulatory jurisdiction over such common carriers; that copies of this order be sent to the heads of the executive departments of the United States; and that notice of this proceeding be given to the public by depositing a copy of this order in the office of the secretary of the commission, at Washington, D. C.

And it is further ordered, That this proceeding be assigned for hearing at such times and places as the commission may hereafter direct.

By the commission.

(SEAL) GEO. B. McGINTY,
Secretary."

In determining whether the Hoch-Smith Resolution operates to subject intrastate rates to suspension by injunction of the federal courts, in advance of a preliminary finding by the In-

terstate Commerce Commission that they are discriminatory against interstate commerce, regard must be had to the cardinal rule applicable to such construction, as laid down by this court in **Illinois Central R. R. vs. Public Utilities Commission**, 245 U. S. 492, 510 hereinafter again cited. In that case, involving passenger fares prescribed by a state statute, the court said:

> "In construing Federal statutes enacted under the power conferred by the commerce clause of the Constitution the rule is that it should never be held that Congress intends to supersede or suspend the exercise of the reserved powers of a state, even where that may be done, unless, and except so far as, its purpose to do so is clearly manifested."

It will be noted that the resolution directs the Commission to make a thorough investigation of "the rate structure of common carriers subject to the Interstate Commerce Act in order to determine to what extent and in what manner existing rates and charges may be unjust, unreasonable, unjustly discriminatory, or unduly preferential *** and to make, in accordance with law, such changes, adjustments and redistribution of rates and charges as may be found necessary to correct any defects so found to exist." And it will be further noted that the Commission's order of investigation embraces all rates, intrastate as well as interstate, of all carriers subject to the Interstate Commerce Act which are engaged in "the transportation or transmission *** in interstate or foreign commerce of the various classes and kinds of commodities and the various classes of traffic, including freight, passenger, mail and express, or any other, similar or dissimilar."

The investigation, accordingly, involves all rates for the transportation of persons or property, intrastate and interstate, of all carriers engaged in interstate or foreign commerce and subject to the Interstate Commerce Act. The resolution itself, however, lays no new injunction upon the carriers, except such as may be implied in the direction given to the Commission, in the concluding paragraph of the resolution, to effect such

lawful changes in rates as will promote the freedom of movement of the products of agriculture "at the lowest possible lawful rates compatible with the maintenance of adequate transportation service."

Rates of common carriers, whether interstate or intrastate, are to be affected, under the resolution, not directly by the resolution itself, but only through the medium of orders of the Commission, made from time to time during the progress of the investigation. Hence neither the resolution itself nor the pendency of No. 17,000, the **Rate Structure Investigation,** thereunder, can give any federal court jurisdiction over any intrastate rate. Only a decision of the Commission that such a rate is violative of federal law, and an order directing the carrier no longer to observe the same, can give a federal court jurisdiction to enjoin its enforcement.

Aside from the direction given as to the level of rates on products of agriculture, application of which is in no way involved in this case, the Hoch-Smith Resolution does not change pre-existing law. The Commission is to prosecute the investigation commanded by the resolution to determine what rates are unjust, unreasonable, unjustly discriminatory or unduly preferential, and is to make orders "in accordance with law *** to correct any defects so found to exist."

To the extent that the Commission finds that intrastate rates do constitute defects in the rate structure of carriers, either because of their ill-relationship to interstate rates, fixed upon a just and reasonable basis, or because they yield an unduly low compensation for services covered, the Commission may order the removal of such defects "in accordance with law." In other words, it may make orders for that purpose of the character and in the manner provided in the Interstate Commerce Act.

The Jurisdiction of the States over Intrastate Rates, Subject to the Power of the Interstate Commerce Commission to Remove Discrimina-

tion, is Conclusively Established by Decisions of this Court.

The Commission in the No. 17,000 proceeding is governed, both in its determination of what rates constitute defects in the rate structure of carriers, and in the making of corrective changes, by pre-existing law. Hence the jurisdiction of the federal courts with respect to intrastate rates is in no way enlarged by the Hoch-Smith Resolution; and we may determine the limitations upon such jurisdiction from the decisions of this Court rendered in cases which have heretofore arisen under the Interstate Commerce Act.

The question whether federal courts may enjoin intrastate rates upon the ground of interference with interstate commerce was most fully considered in the **Minnesota Rate Cases**, 230 U. S. 352. That case was closely similar to this, in that, as in this case, it was there claimed that the intrastate rates complained of should be enjoined as an interference with interstate commerce because, if made effective, they would dstroy a pre-existing relationship between intrastate rates and interstate rates, which had long been maintained, and because such intrastate rates would unjustly discriminate in favor of interstate shippers.

The conclusion of the trial court, upon which an injunction was rested, was stated as follows:

> "That to maintain the commodity rates for transportation wholly within Minnesota simultaneously with the interstate rates now in force would involve unjust discrimination and would seriously impair the interstate business of the companies, to avoid which it would be necessary to reduce the basis of the interstate rates to a substantial parity with that prescribed by the state law." (230 U. S. 389)

Upon appeal, this Court, after a most comprehensive review of the decisions, and after a careful analysis of the Act to Regulate Commerce, reached the conclusion that the several states retained jurisdiction to regulate rates applicable to intrastate transportation, and that the federal courts, in the absence of

Congressional legislation empowering them thereto, could not restrain enforcement of such intrastate rates upon the ground of interference with interstate commerce. Negativing the contention that the intrastate rates must be maintained on a level not below interstate rates, the Court said:

> "To say that this power (to regulate) exists, but that it may be exercised only in prescribing rates that are on an equal or higher basis than those that are fixed by the carrier for interstate transportation is to maintain the power in name while denying it in fact." (230 U. S. 417)

The immunity of intrastate commerce from regulation not provided for by Congress, in the exercise of its powers under the Commerce Clause, was recognized as follows:

> "If the situation has become such, by reason of the interblending of the interstate and intrastate operations of interstate carriers, that adequate regulation of their interstate rates cannot be maintained without imposing requirements with respect to their intrastate rates which substantially affect the former, it is for Congress to determine, within the limits of its constitutional authority over interstate commerce and its instruments the measure of the regulation it should supply." (230 U. S. 432)

> "It is the function of this court to interpret and apply the law already enacted, but not under the guise of construction to provide a more comprehensive scheme of regulation than Congress has decided upon. Nor, in the absence of Federal action, may we deny effect to the laws of the State enacted within the field which it is entitled to occupy until its authority is limited through the exertion by Congress of its paramount constitutional power." (230 U. S. 433)

It had been urged upon the Court in the **Minnesota Rate Cases** that Congress, in the third section of the Act, had prohibited carriers from giving undue or unreasonable preferences or advantages, and that this prohibition applied as well to forbid discrimination arising from intrastate rates as that arising from interstate rates exclusively. Upon this point the Court said:

> "If it be assumed that the statute should be so construed * * it would inevitably follow that the controlling principle governing the enforcement of the act should be applied to such cases as might thereby be brought within its purview; and the question whether the carrier, in such a case, was giving an undue or unreasonable preference or advantage to one locality as against another, or subjecting any locality to an undue or unreasonable prejudice or disadvantage, would be primarily for the investigation and determination of the Interstate Commerce Commission and not for the courts." (230 U. S. 419)

Later, in the Shreveport case (**Houston, E. & W. Tex, Ry vs. United States, 234** U. S. 342) this Court held that Section 3 did prevent discriminations caused by intrastate rates prescribed by state authority, and that an order of the Interstate Commerce Commission requiring the removal of discrimination found to be so caused operated to relieve carriers from obligation to observe the intrastate rates found to cause the discrimination. In the opinion in that case, however, the Court, considering the applicable provisions of the statute under which the Interstate Commerce Commission had acted, explicitly recognized the continued authority of a state over intrastate rates, in the absence of action by the Commission under the federal statute, saying:

> "Undoubtedly—in the absence of a finding by the Commission of unjust discrimination—intrastate rates were left to be fixed by the carrier, and subject to the authority of the states, or of the agencies created by the states. This was the question recently decided by this court in the Minnesota Rate Cases." (234 U. S. 357)

The question again arose in **American Express Co. v. Caldwell, 244** U. S. 617. In that case the Interstate Commerce Commission, having found that intrastate express rates in the southeastern section of South Dakota caused undue discrimination against Sioux City, Iowa, had ordered abatement of the discrimination. The Express Company attempted to raise all intrastate rates in South Dakota to the interstate level. The Supreme Court of South Dakota enjoined the raising of any in-

trastate rates. Upon appeal to the United States Supreme Court, the rule laid down in the **Shreveport case** was reaffirmed, but it was reaffirmed also that interference with the intrastate rates prescribed by state authority could go no further than necessary to remove discrimination found by the Commission. I quote from the opinion:

> "Where, as here, there is a conflict between the Federal and the state authorities, the Commission's order cannot serve as a justification for disregarding a regulation or order issued under state authority, unless, and except so far as, it is definite as to the territory or points to which it applies. For the power of the Commission is dominant only to the extent that the exercise is found by it to be necessary to remove the existing discrimination against interstate traffic." (244 U. S. 625)

In **Illinois Central Railroad v. Public Utilities Commission,** 245 U. S. 492, hereinbefore cited, which was a case wherein the plaintiff sought to enjoin the enforcement of the Illinois two-cent fare statute, the Interstate Commerce Commission had found that intrastate passenger fares in Illinois, on a basis lower than interstate rates contemporaneously in force, operated to cause undue discrimination against St. Louis and Keokuk and had ordered abatement. The order, however, was held of no effect because of its failure to designate with appropriate precision the territory or points to or from which the intrastate rates must be readjusted to remove the discrimination found. Laying down the rule of construction which we have hereinbefore quoted, the Court continued:

> "We conclude that the uncertainty in this order is such as to render it inoperative and of no effect as to the intrastate rates established and maintained under a law of the state, and therefore that the suits by the carriers were rightly dismissed on the merits." (245 U. S. 510)

The cases which we have hereinbefore cited all arose prior to the enactment of Transportation Act, 1920. However, the amendments to the Act to Regulate Commerce contained in Transportation Act, 1920, while enlarging the power of the In-

terstate Commerce Commission, both with respect to the facts which it might consider as ground for holding intrastate rates discriminatory, and as respects the manner in which it might abate discriminations found, did not withdraw intrastate rates from the primary control of the states. This question was dealt with in **C. B. & Q R. R. v. Wisconsin Railroad Commission, 257 U. S. 563.**

In that case, the Wisconsin commission, being bound by statute, had refused to permit intrastate passenger fares to be advanced to the level of interstate fares, found reasonable by the Interstate Commerce Commission in **Ex Parte 74, 58 I. C. C. 220**; and the Interstate Commerce Commission had found that the loss of revenue resulting from the lower intrastate scale required operated as a discrimination against interstate commerce generally. This discrimination the Commission ordered the carriers to abate. Thereupon the United States District Court, upon application of the carriers, enjoined the state commission and the Attorney General from taking any action to enforce the fares prescribed by state authority. In this Court the injunction was sustained. It was, however, made clear that the injunction rested upon the Commission's order, and that in the absence of such order the authority of the state would control. The Court said:

> "It is said that our conclusion gives the Commission unified control of interstate and intrastate commerce. It is only unified to the extent of maintaining efficient regulation of interstate commerce under the paramount power of Congress. It does not involve general regulation of intrastate commerce. Action of the Interstate Commerce Commission in this regard should be directed to substantial disparity which operates as a real discrimination against, and obstruction to, interstate commerce, and must leave appropriate discretion to the state authorities to deal with intrastate rates as between themselves on the general level which the Interstate Commerce Commission has found to be fair to interstate commerce.
>
> "It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in

particular localities, reduce income instead of increasing it, by discouraging patronage. Such cases would be within the saving clause of the order herein, and make proper an application to the Interstate Commerce Commission for appropriate exception. So, too, in practice, when the state commissions shall recognize their obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate rates, conference between the Interstate Commerce Commission and the state commissions may dispense with the necessity for any rigid Federal order as to the intrastate rates, and leave to the state commissions power to deal with them and increase them or reduce them in their discretion." (257 U. S. 590)

The North Dakota Commission Followed the Exact Course Outlined by this Court in the Wisconsin Passenger Fare Opinion.

The exact course which was, in the language just quoted, suggested by this Court is shown to have been followed in this case. North Dakota was one of the states which did not permit straight percentage increases in intrastate rates conforming to the **Ex Parte 74** advances in interstate rates; and such advances were made intrastate under an order of the Interstate Commerce Commission. (R. 5) Reference to the reports of the Interstate Commerce Commission (61 I. C. C. 504) will disclose the fact that this was not due to any disinclination on the part of the North Dakota Commission to permit such rates as would yield from North Dakota traffic its fair proportion of adequate carrier revenues. The causes which led to the making of the order of the Interstate Commerce Commission, covered by the report cited, are not relevant for discussion here. From this record, however, it does appear that, following the decision of this Court in the **Wisconsin Passenger Fare Case**, the North Dakota Commission recognized its obligation to maintain a proportionate and equitable share of the income of the carriers from intrastate traffic in North Dakota, and entered an order adopting intrastate rates which the Interstate Commerce Commission had prescribed. (R. 5)

While the printed record does not set forth the fact that this was done in accordance with an understanding produced "by

conference between the Interstate Commerce Commission and the state commissions", (257 U. S. 590) it may be assumed that this Court will take judicial notice of the report of the Interstate Commerce Commission to the Congress, dated December 1, 1922, wherein the following appears at page 8:

> "With the expansion of our railway systems and industrial activities Federal regulation of interstate commerce and State regulation of intrastate commerce have become more and more closely interrelated. The avoidance of harmful maladjustments of interstate and intrastate rates and fares by coordinated efforts has long been recognized as desirable, but until recently the Federal and State commissions have continued to perform their respective functions independently of one another to a large extent. This course has required of this commission the condemnation of maladjustments which injuriously discriminated against interstate commerce and frequently their correction by revision of the intrastate rates and fares. In the transportation act, 1920, the Congress enjoined active cooperation between the regulatory bodies, and authorized this commission to avail itself of the cooperation, services, records, and facilities of the State authorities in the enforcement of any provision of the interstate commerce act. The Supreme Court of the United States in Railroad Commission of Wisconsin v. Chicago, Burlington & Quincy Railroad Company, 257 U. S. 563, decided February 27, 1922, emphasized the desirability of such cooperation.
>
> On May 3, 1922, a joint committee composed of five members of this commission and eight representatives of the State commissions, sitting at Washington, formulated and reported a tentative plan of cooperation through joint conferences and hearings, which is reproduced in Appendix H. It is to be expected that experience will suggest improvements in this plan, but its general outline embodies what is believed to be a sound working basis, and the progress already made thereunder encourages the hope of its ultimate success. The procedure outlined in the plan will, with the spirit of cooperation behind it, avoid conflict of authority and redound to the benefit of shipper, carrier, and public.
>
> In No. 13494, Southern Class Rate Investigation, and in No. 13930, Express Rates, 1922, together with other pending matters, committees representing interested State commissions are participating with us.

> The cooperative program has incidentally resulted in the making of orders by State commissions, and the consequent vacating by us of our previous orders, affecting intrastate freight rates in many of the State rate cases."

From the recitations of the carriers' bill of complaint in this case it appears that the order of the Interstate Commerce Commission prescribing intrastate rates in North Dakota was made on May 3, 1921. (R. 4) The opinion of this Court in the **Wisconsin Passenger Fare Case** was rendered February 27, 1922. The cooperative agreement between the Interstate Commerce Commission and the state commissions, as we have just seen, was effected on May 3, 1922. From the carriers' bill of complaint it further appears that on June 5, 1922, the Board of Railroad Commissioners of North Dakota made an order reciting that the order of the Interstate Commerce Commission had practically deprived the North Dakota Commission of power to regulate intrastate rates, and that appropriate action should be taken to terminate its disability. (R. 5) Said order provided that the rates established by the order of the Interstate Commerce Commission should continue in effect "until revoked, modified, or suspended by appropriate lawful proceedings before this Commission, or as otherwise provided by law." Said order also provided that a copy of the same should be served upon the Interstate Commerce Commission, "with appropriate application for the rescinding of its order." (R. 5)

Such application was made, and the Interstate Commerce Commission on July 22, 1922, entered an order of recission wherein it was recited that if an order of vacation of its order of May 3, 1921, should be entered, "the existing increased intrastate rates and charges for freight service in said state will continue in force and effect until revoked, modified, or superseded by appropriate lawful proceedings before said Board or as otherwise provided by law." (R. 6)

It thus appears that the orders made by the Interstate Commerce Commission and by the North Dakota Commission, di-

rectly following the suggestions of this Court in the **Wisconsin Passenger Fare Case**, were, as indicated in those orders, for the purpose of restoring to the state commission its power to regulate intrastate rates, so that the state commission might be left, as suggested by this Court, "to deal with them and increase them or reduce them in their discretion." 257 U. S. 590

This discretion may not be abused. The obligation of intrastate traffic "to maintain a proportionate and equitable share of the income of the carriers" must be met, and failure in this respect may lead to a resumption of control by the Interstate Commerce Commission. Until that Commission, acting in the exercise of powers delegated to it by Congress, shall find such failure, however, the discretion and power of the North Dakota Commission to deal with the rates applicable to intrastate traffic in North Dakota are full and complete.

The Exercise of Rate-Making Power by the States is in Accord with the Essential Policy of our System of Government and Indispensable to the Efficient Regulation of Carriers Under Existing Federal Law.

As was said in the **Minnesota Rate Cases opinion**, cited supra:

> "Our system of government is a practical adjustment by which the National authority as conferred by the Constitution is maintained in its full scope without unnecessary loss of local efficiency. Where the subject is peculiarly one of local concern, and from its nature belongs to the class with which the State appropriately deals in making reasonable provisions for local needs, it cannot be regarded as left to the unrestrained will of individuals because Congress has not acted, although it may have such a relation to interstate commerce as to be within the reach of the Federal power. In such case, Congress must be the judge of the necessity of Federal action. Its paramount authority always enables it to intervene at its discretion for the complete and effective government of that which has been committed to its care, and, for this purpose and to this extent, in response to a conviction of national need, to displace local laws by substituting laws of their own. The successful working of our constitutional system has thus been made possible." (230 U. S. 402)

The Interstate Commerce Act, as amended by Transportation Act, 1920, is deficient in its provision of convenient procedure for the exercise of the supervisory power over intrastate rates which, under the act as interpreted by this Court, has been devolved upon the Interstate Commerce Commission.

It is provided in paragraph (4), Section 13 of the Act, that rates prescribed by an order made under that section "shall be observed while in effect by the carriers parties to such proceeding affected thereby, the law of any state or the decision or order of any state authority to the contrary notwithstanding." The order being once in force, no variation from the rates therein prescribed may be made, even though desired by shippers and carriers, and assented to by state authority. Only by reopening the proceeding before the Interstate Commerce Commission and modifying the order of that Commission can one of the prescribed rates be changed.

Under existing law the Interstate Commerce Commission has no power to deal with intrastate rates for the removal of discrimination as between such rates. It may, as to intrastate rates, act only to remove discrimination against interstate commerce. If changes in the state rate structure made by the Interstate Commerce Commission for the purpose of removing discrimination against interstate commerce produce maladjustments in the state rate structure, so that further changes are necessary to produce harmonious intrastate rates "only the state authority can produce such harmony." **(Wisconsin Passenger Fare Case,** 257, U. S. 580.)

In the **Illinois Freight Rate Case,** 60 I. C. C. 92, on January 1, 1921, the Interstate Commerce Commission, by mandatory order fixed all freight rates in Illinois. On July 7, 1921, while the first mentioned order continued in effect, in the **Illinois Coal Cases,** 62 I. C. C. 741, 743, upon complaint of Illinois coal operators that their rates, interstate and intrastate, were unreasonable, the Commission said:

> "Since intrastate rates are not subject to our jurisdiction, excepting under conditions not here present, interstate rates only will be considered." (p. 743)

Being without jurisdiction over intrastate rates except for the sole purpose of removing discrimination against interstate commerce, the federal commission is without power to reduce intrastate rates because they are so high as to operate to discriminate against intrastate commerce in favor of interstate commerce. This precise question was before the Interstate Commerce Commission, and explicitly decided by it, in **Mutual Creamery Co. v. American Express Company**, 132 I. C. C. 207, 210. The following is from the Commission's report in that case:

> "A jurisdictional question is presented by that portion of the complaint which alleges undue prejudice to and unjust discrimination against intrastate traffic, to the undue preference of interstate traffic, as above set forth, in violation of sections 3 and 13 of the act. * * * We have not hitherto in any case given the specific consideration to the question which the pending complaint calls for.
>
> Under the provisions of section 3 (1), which in their present form were part of the original act, our authority to deal indirectly with intrastate rates of an interstate carrier subject to the act for the purpose of removing undue prejudice to the interstate commerce of persons and localities has been upheld. **Houston & Texas Ry. v. United States**, 234 U. S. 342; **Ill. Cent. R. R. Co. v. Public Utilities Comm.**, 245 U. S. 493. But section 13 (4), added by the transportation act, 1920, makes specific provision with respect to interstate-intrastate rate maladjustments, and upon it the present question therefore turns. It empowers us, in cases of 'undue or unreasonable advantage, preference, or prejudice as between persons or localities in intrastate commerce on the one hand and interstate or foreign commerce on the other hand, or any undue, unreasonable, or unjust discrimination against interstate or foreign commerce, which is hereby forbidden and declared to be unlawful,' to prescribe rates which will remove such advantage, preference, prejudice, or discrimination. Under its provisions our authority to deal directly with intrastate rates and fares in order to remove undue prejudice to or unjust discrimination against interstate commerce has been upheld.

Wisconsin R. R. Comm. v. C., B. & Q. R. R. Co., 257 U. S. 563; **New York v. United States**, 257 U. S. 591.

The cases cited are of immediate interest, for the reason that the power and duty of the States in respect of intrastate commerce, reserved to them by the Constitution and expressly excluded from our powers under the interstate commerce act, are left undisturbed. The coexisting Federal power over the relationship of interstate and intrastate rates may be exercised in direct operation upon intrastate rates only to the extent necessary for effective regulation of interstate or foreign commerce. In **Texas v. Eastern Texas R. R. Co.**, 258 U. S. 204, 217, it was said with reference to our power to authorize abandonment of intrastate operations by a railroad located entirely within a single State:

> 'If paragraphs 18, 19 and 20 (of section 1 of the act) be construed as authorizing the Commission to deal with the abandonment of such a road as to intrastate as well as interstate and foreign commerce, a serious question of their constitutional validity will be unavoidable. If they be given a more restricted construction, their validity will be undoubted. * * *
>
> Being amendments of the Interstate Commerce Act they are to be read in connection with it and with other amendments of it. As a whole these acts show that what is intended is to regulate interstate and foreign commerce and to affect intrastate commerce only as that may be incidental to the effective regulation and protection of commerce of the other class.'

The court's remarks are applicable to the provisions of section 13 (4). There is not to be imputed to Congress an intention to transcend its constitutional powers unless the section in question is not reasonably susceptible of any other interpretation, which manifestly is not the case. Only in a strained sense could it be said that the removal of undue prejudice to or unjust discrimination against interstate commerce resulting from a difference in levels of interstate commerce calls for no such action. The interstate commerce act should not be broadly construed to empower this commission to take action against rate adjustments for purposes which are primarily of intrastate concern and are not essential to the proper regulation of either interstate or foreign commerce.

Our conclusion is that an issue of undue prejudice to intrastate commerce and undue preference of interstate commerce, and of unjust discrimination against intra-

> state commerce, is not within the purview of the act we administer, and we so found. Accordingly, no consideration will be given to any of the evidence touching that issue."

The Federal Constitution and laws enacted thereunder should be construed to permit a practical adjustment as between the exercise of the dominant power of the federal government and the reserved powers of the several states without loss of efficiency of governmental action. If, however, the judgment of the court below shall be sustained it will result that intrastate shippers may be subjected to unjust and discriminatory rates without power in any governmental tribunal, federal or state, to reduce them.

If the Pendency of No. 17,000 is Ground for the Granting of this Injunction, Then no State may Regulate any Intrastate Rates While that Proceeding Remains Pending Before the Interstate Commerce Commission.

If the pendency of No. 17,000 before the Interstate Commerce Commission prevents the North Dakota Commission from regulating the rates here involved, it likewise prevents that commission from regulating any intrastate rates, and prevents every other state commission in the United States, in the same way, from regulating any intrastate rates.

This conclusion necessarily follows because No. 17,000 embraces all intrastate rates not only in North Dakota but in every other state to the same extent that it embraces the rates which are the immediate subject matter of this litigation. Accordingly, if the pendency of that case disables the North Dakota Commission from dealing with those rates, it also disables the rate-making authorities of every state from dealing with any rates.

It cannot be supposed that Congress intended to produce this situation. It would not override the accustomed powers of the states without provision of a substitute. What the court said on this point in the **Minnesota Rate Cases** opinion is as applic-

able to this case as it was to the cases then before the court. The following is quoted from that opinion:

> "Congress did not undertake to say that the intrastate rates of interstate carriers should be reasonable or to invest its administrative agency with authority to determine their reasonableness. Neither by the original act nor by its amendment, did Congress seek to establish a unified control over interstate and intrastate rates; it did not set up a standard for intrastate rates, or prescribe, or authorize the Commission to prescribe, either maximum or minimum rates for intrastate traffic. It cannot be supposed that Congress sought to accomplish by indirection that which it expressly disclaimed, or attempted to override the accustomed authority of the States without the provision of a substitute. On the contrary, the fixing of reasonable rates for intrastate transportation was left where it had been found; that is, with the States and the agencies created by the States to deal with that subject." (230 U. S. 420)

II.

THE PENDENCY BEFORE THE INTERSTATE COMMERCE COMMISSION OF A PROCEEDING UNDER SECTION 13 OF THE INTERSTATE COMMERCE ACT INVOLVING THE ORDER OF THE BOARD OF RAILROAD COMMISSIONERS OF MAY 8, 1929, IS NOT GROUND FOR INJUNCTION, AND DOES NOT GRANT THE COURT JURISDICTION TO GRANT AN INTERLOCUTORY INJUNCTION.

It would seem almost superfluous to argue that mere allegation of illegality before a tribunal established with jurisdiction to adjudicate as to legality, is not the equivalent of adjudication and judgment of illegality. If it were, then carriers might secure injunction to prevent the enforcement of any and all intrastate rates merely by filing against them a 13th Section petition with the Interstate Commerce Commission, following such application with a petition to the federal courts for the injunction.

Whether intrastate rates are or not discriminatory is a question of fact and of discretion in technical matters. It is the policy of the Congress, as expressed in the Interstate Commerce Act, to commit that question to the Interstate Com-

merce Commission for preliminary determination. This was clearly stated by this Court in **Great Northern Railroad** v. **Merchants Elevator Co.**, 259 U. S. 291, as follows:

> "Whenever a rate, rule, or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. Sometimes this is required because the function being exercised is in its nature administrative, in contradistinction to judicial. But, ordinarily, the determining factor is not the character of the function, but the character of the controverted question and the nature of the inquiry necessary for its solution. To determine what rate, rule or practice shall be deemed reasonable for the future is a legislative or administrative function. To determine whether a shipper has in the past been wronged by the exaction of an unreasonable or discriminatory rate is a judicial function. Preliminary resort to the Commission is required alike in the two classes of cases. It is required because the inquiry is essentially one of fact and of discretion in technical matters, and uniformity can be secured only if its determination is left to the Commission. Moreover, that determination is reached ordinarily upon voluminous and conflicting evidence, for the adequate appreciation of which acquaintance with many intricate facts of transportation is indispensable; and such acquaintance is commonly to be found only in a body of experts."

It is a well settled rule, adopted for the preservation of uniformity, which it was the purpose of the Interstate Commerce Act to secure, that the courts may not exert authority over subjects which primarily come within the jurisdiction of the Commission in advance of action thereon by the Commission. **Great Northern Ry.** v. **Merchants Elevator Co.**, 259 U. S. 285, 66 L. ed. 943; **Texas & Pac. Ry. Co.** vs. **American Tie & Timber Co., Limited**, 234 U. S. 138, 58 L. ed. 1255; **Texas & P. R. Co.** vs. **Abilene Cotton Oil Co.**, 204 U. S. 426, 51 L. ed. 553; **Morrisdale Coal Co.** vs. **Pennsylvania R. Co.**, 230 U. S. 303, 57 L. ed. 1495; **Mitchell Coal & Coke Co.** vs. **Pennsylvania R. Co.**, 230 U. S. 247, 57 L. ed. 1472; **Baltimore & O. R. Co.** vs. **U. S.**, 215 U. S. 481, 54 L. ed. 293; **Director General of Railroads** vs. **Viscose Co.**, 254 U. S. 498, 65 L. ed. 373; **Northern Pacific R. Co.** v. **Solum**, 247 U. S. 477, 62 L. ed. 1221.

III.

THE DISCRETION OF THE BOARD OF RAILROAD COMMISSIONERS IN FIXING INTRASTATE RATES SHOULD NOT BE INTERFERED WITH BY THE COURTS IN THE ABSENCE OF A FINDING BY THE INTERSTATE COMMERCE COMMISSION TO THE EFFECT THAT SUCH INTRASTATE RATES CAST A DISCRIMINATORY BURDEN UPON INTERSTATE COMMERCE OR DISCRIMINATE AGAINST PERSONS OR PLACES ENGAGED IN INTERSTATE COMMERCE.

We have hereinbefore cited decisions of this Court to the effect that interference with intrastate rates prescribed by state authority, not claimed to be confiscatory, is beyond the jurisdiction of the federal courts, in the absence of a finding by the Interstate Commerce Commission that such rates create undue discrimination in violation of the Interstate Commerce Act. Unless confiscation is alleged as the basis for relief sought, the reasonableness of the rates is not in issue, except for the purpose of establishing undue discrimination. In this case confiscation is not alleged, and the statutory court expressly disclaimed finding discrimination. But in any event the record does not justify the issuance of the injunction sought to be set aside by the plaintiff's appeal.

The rates prescribed by the state commission are **prima facie** fair and valid, and this presumption cannot be destroyed by the mere fact that proceedings are pending before the Interstate Commerce Commission in an investigation instituted by it in accordance with the mandate of the Hoch-Smith Resolution or by the fact that a petition is pending before that commission under Section 13 of the Interstate Commerce Act. Even in cases of alleged confiscation it is the rule of this Court that an injunction should be granted only when evidence presented shows a reasonably clear case of confiscation. **Knoxville** vs. **Knoxville Water Co.**, 212 U. S. 1, 53 L. ed. 371; **Railroad Commission of Louisiana** vs. **Cumberland Teleph. & Teleg. Co.**, 212 U. S. 414, 53 L. ed. 577; **Phoenix Railway Co. of Arizona** vs. **Geary et al**, 239 U. S. 277, 60 L. ed. 287; **United States of America** vs.

New York Central R. Co., 272 U. S. 457, 71 L. ed. 351; Railroad Commission of Alabama vs. Central of Ga. Railway Co,. 170 Fed. 225, 95 C. C. A. 117.

The Action of the North Dakota Commission in Prescribing the Rates Here Involved Was in no Sense Arbitrary or Unreasonable.

If the reasonableness of the action taken by the North Dakota Commission were subject to review in this proceeding, it would be found that it acted only in the performance of its manifest duty. The fact that its order reduces some of the rates which were produced by the **Ex Parte 74** increases has no tendency even to show that the prescribed rates are either discriminatory or unreasonable. That the great percentage increases found necessary in **Ex Parte 74** would produce maladjustments in the rate structure which might well require to be remedied was recognized by this Court in the **Wisconsin Passenger Fare Case,** wherein it was said:

> "It may well turn out that the effect of a general order in increasing all rates, like the one at bar, will, in particular localities, reduce income instead of increasing it, by discouraging patronage." (257 U. S. 590)

The North Dakota Commission, in conformity with the admonition of this Court, has recognized its obligation to permit rates applicable to intrastate traffic in North Dakota which will yield an equitable share of needed carrier revenue. It is proceeding in strict conformity with the plan provided for by Congress in paragraph (4) of Section 13 of the Interstate Commerce Act, authorizing cooperation, and recommended by this Court in the **Wisconsin Passenger Fare Case.**

The Interstate Commerce Commission instituted the No. 17,000 investigation on March 12, 1925. The North Dakota Commission instituted a like investigation on May 9, 1929. (R. 7) The North Dakota Commission is cooperating in No. 17,000. In Part II, involving class rates, a member of the North Dakota Commission has been sitting with the Interstate Commerce Commission (R. 36). It is the intention of the

North Dakota Commission, when interstate rates shall be fixed in that proceeding, to bring the intrastate rates in North Dakota upon the same classes of traffic into harmonious relation with such interstate rates. Its reports disclose that purpose.

After the North Dakota Commission had fully investigated the intrastate rate situation it delayed action for the express purpose of awaiting the action of the Interstate Commerce Commission. (See recital of carriers' bill September 2, 1927. R. 7) It was not till May 8, 1929, more than four years after the Interstate Commerce Commission investigation had been ordered in No. 17,000, and one year and eight months after the order of postponement just mentioned, that the North Dakota Commission acted, and made the reductions found by it necessary to relieve intrastate shippers in North Dakota from unjust and discriminatory rates. And then, in making its order, the commission expressly provided:

> "That all of these findings of fact and conclusions are without prejudice to different conclusions which may be reached in the cooperative proceedings now pending jointly before the Interstate Commerce Commission and western state Railroad Commissions." (R. 20)

If the rates ordered reduced were in fact unjustly discriminatory the North Dakota Commission was the only commission which could afford relief, and it was the duty of that commission to act. Paralysis of state governments was not designed by Congress to be produced by its grant of power to the Interstate Commerce Commission to prevent injury to interstate commerce from discriminatory rates.

The situation which faced the North Dakota Commission is well shown by the following paragraphs quoted from its report of May 8, 1929:

> "Complainants for Jamestown and other interior jobbing cities call attention to the fact that they have been trying for the past ten or twelve years to obtain some measure of relief from the much greater basis of joint line rates, which they are compelled to pay, in contrast

with the lower basis of joint rates enjoyed by Grand Forks, Fargo and Wahpeton, and urge that some definite action be taken by us in the instant cases. (R. 18)

"In our original report in Case No. 2255 we said, 'There is every indication that the class rate investigation being conducted jointly by the Interstate Commerce Commission and the respective State Commissions will be completed and a decision rendered within a reasonably short time,' and 'We are not unmindful of the fact that shippers and carriers have gone to considerable expense in preparing exhibits and submitting their case before us. The record with respect to class rates will accordingly be held open for further hearing in connection with Case No. 2255, Sub. 2, after the Interstate Case is decided.'

"To date the Interstate Commerce Commission, due to the thousands of pages of transcript, hundreds of exhibits, together with the tremendous scope of the investigation has been unable to render a tentative report which, as a matter of course, must be followed by briefs and lengthy oral argument. It therefore appears to us that the prayer of the shippers for relief, which has already been pending for years should not be further delayed in the hope that their problems might be solved or partially solved at some indefinite date in the future." (R. 17)

Nothing except impotency to act would excuse non-action on the state commission's part under the circumstances found. In any event, whether the commission should act or continue longer to await decision by the Interstate Commerce Commission was a matter for its discretion. It certainly has not exercised that discretion arbitrarily. In its report of September 2, 1927, (R. 7) it reduced certain intrastate freight rates, but then postponed action on class rates because an early decision from the Interstate Commerce Commission as to class rates was then expected. The intention of the North Dakota Commission then was and now is, as both that report and the report of May 8, 1929, show, to establish intrastate rates in harmony with interstate rates. The intrastate class rates now in force do not harmonize with the existing interstate rates. The order of May 8, 1929, was designed to remove existing discriminations against intrastate shippers. If such new interstate class rates as may finally be promulgated and established as the result of

the proceedings in No. 17,000 shall be out of harmony with the intrastate rates prescribed by the state commission order of May 8, 1929, the intrastate rates will be readjusted.

The opinion of the court below suggests that the rates prescribed by the state commission's order "if they prove temporary merely—as the plaintiffs (carriers) contend they will—will only briefly afford the relief sought and may ultimately prove more of a disadvantage than otherwise to those for whose benefit they are intended."

With the utmost respect for the learned court from which the opinion came, it should be observed that the state commission, to which by law the regulation of carriers and carrier rates, as respects intrastate commerce, is especially committed, which is working in close cooperation with the Interstate Commerce Commission in the hearing and consideration of No. 17,000, is much better qualified, and in a much better position, to judge of the probable length of time that will elapse before interstate class rates will be promulgated as a result of those proceedings—with which interstate rates the intrastate rates in question may be compared—and also is better qualified, and in a better position to judge whether such intrastate rates are likely to be so far out of line with interstate rates finally prescribed as to require readjustment, and, further, is better qualified to judge as to the importance to the intrastate shippers of North Dakota of receiving just and non-discriminatory rates during the period which will intervene before interstate rates will be promulgated in No. 17,000.

In this connection—while it is somewhat beside the point—it is interesting to note that while the carriers represented to the court below that a decision concerning class rates in No. 17,000 might be expected in 1929 (R. 7) no such decision has been rendered which can be cited to this Court.

That the action of the state commission was not precipitate is conceded in the opinion of the court below, and that court

expressly disclaimed any finding that the rates prescribed will cause unjust discrimination, or that there is any undue disparity between those rates and the intrastate rates. On this point the court said:

> "The position of the defendants (the state commission) is not unreasonable. It is evident, from the recitals in the order of the State Board, that the length of time consumed by the Interstate Commerce Commission in reaching a decision in Docket No. 17,000, has, in the opinion of the State Board, resulted in a denial of justice with respect to the rates in question, and that jobbers at certain jobbing points in the State are believed to be unduly prejudiced because of alleged disparity between intrastate class rates and interstate class rates from outside jobbing points, and that it was in an endeavor to do away with the discrimination believed to exist that the order of May 8th was made. It is conceded—as, of course, it must be—that this court has no power to determine the question as to whether the rates fixed by the order of May 8th do or do not discriminate against interstate commerce, or whether they do or do not create an undue disparity between intrastate and interstate rates. That question is before the Interstate Commerce Commission and it alone has jurisdiction to determine it. It may find that the State Board was well within its rights in doing what was done, or it may find to the contrary." (R. 86)

The Injunction in This Case Was Granted in Disregard of the Provisions of Section 19 of the Act of October 15, 1914.

Apparently the court below is of the opinion that the state commission is not absolutely without jurisdiction. It is not obliged to await Interstate Commerce Commission action indefinitely. It must wait only so long as the court thinks reasonable. In its opinion, the court said:

> "If, for any reason, the Interstate Commerce Commission should fail or refuse to decide whether the rates fixed by the order of May 8, 1929, are violative of Section 13 of the Interstate Commerce Act, or to make findings or reach a decision from which that question may be fairly determined, or shall hereafter unreasonably delay determination of that question, the defendants may move for a vacation of the injunction."

It thus appears that rates prescribed by the law of North Dakota have been enjoined without a finding by any tribunal that those rates are in any respect unconstitutional.

Section 19 of the Act of October 15, 1914, chap. 323, 38 Stat. at L. 730, 738, U. S. C. Title 28, Sec. 383, provides "That every order for an injunction shall set forth the reasons for the issuance of the same."

The intent and purpose of this statute may have been twofold: First, to compel the court to an examination of the legal grounds for the injunction before the same shall be issued, and second, to facilitate a review of the legality of the injunction upon appeal.

In this case no legal reasons for issuing the injunction are set forth in the opinion. The reasons which are set forth, to the extent that they have any relation to the rates affected by the injunction, may be summarily stated as follows:

(1) That such rates would be substantially below interstate class rates applied to and from North Dakota for similar services. If this be true, it does not show the rates to be unconstitutional.

It is not claimed that they are confiscatory, and whether there is such disparity as to create undue discrimination is a question the decision of which is essentially one of fact and of discretion in technical matters, which in accordance with the plan of Congress, is to be made in the first instance by the Interstate Commerce Commission. The court in its opinion expressly disclaimed any finding of discrimination.

(2) That there is now pending before the Interstate Commerce Commission a proceeding in which the Interstate Commerce Commission will determine whether the rates enjoined do or not cause unjust discrimination against interstate commerce.

The fact that a proceeding to test the validity of rates has been instituted before the Interstate Commerce Commission certainly does not show that the rates in question are unlawful.

(3) That if the rates enjoined were made effective, and if they should later by the Interstate Commerce Commission be found unreasonably low, and hence unjustly discriminatory against interstate commerce, the carriers would from their establishment and collection suffer irreparable damage and an unlawful burden would be placed on interstate commerce.

This finding amounts to nothing as the basis for the issuance of an injunction. It is not a finding by the court that the carriers will suffer irreparable damage from the establishment of the rates, but only a finding that they will suffer such damage,if the rates prescribed by the state commission are in fact unreasonable and unlawfully low—as to which any finding is, in the opinion, expressly disclaimed.

There are no other findings which in any way relate to the rates enjoined, or which constitute legal reason for the granting of the injunction. The intent of the statute requiring a statement of reasons, of course, was that good and sufficient reasons in law should be stated. No such reasons are stated in this injunction. It was, accordingly, granted in disregard of the statute.

The injunction was also granted in disregard of the plain admonition of this court in **Lawrence v. St. Louis-San Francisco Railway**, 274 U. S. 588, 591, 594. In that case the plaintiff had obtained from the District Court an injunction restraining action to compel the carrier involved to make application to the Oklahoma Corporation Commission before abandoning the operation of certain railroad shops. Upon appeal to this court the injunction was set aside, the Court saying:

> "The decree disregards the requirement of Sec. 19 of the Act of October 15, 1914, chap. 323, 38 Stat. at L. 730, 738, U. S. C. title 28, Sec. 383, 'that every order for an injunction shall set forth the reasons for the issuance of

the same, shall be specific in terms . . .' It does not declare that the Oklamoha statute is unconstitutional; nor does it state any other reason why the action enjoined is a violation of plaintiff's rights. It does not recite, even in general terms, that there is danger of irreparable loss. ***

"We have no occasion to determine whether the Oklahoma act is obnoxious to the Federal Constitution. But as bearing upon the propriety of issuing the temporary injunction, the fact is important that the controversy concerns the respective powers of the nation and of the states over railroads engaged in interstate commerce. Such railroads are subject to regulation by both the state and the United States. The delimitation of the respective powers of the two governments requires often nice adjustments. The federal power is paramount. But public interest demands that whenever possible conflict between the two authorities and irritation be avoided. To this end it is important that the federal power be not exerted unnecessarily, hastily, or harshly. It is important also that the demands of comity and courtesy, as well as of the law, be deferred to."

The Requirement of a Bond Neither Cures the Illegality of the Injunction Nor Adequately Protects the Public from Injury Thereby.

If the court below was without jurisdiction to entertain the carriers' application for an injunction upon the grounds and under the circumstances shown in their petition, the fact that a bond was required, which the court below thinks will "mitigate" the damage done to shippers by the injunction, does not cure the illegality of the injunction. Furthermore, such a bond is only a partial protection to the public. It may protect the large shipper, but the small shipper and the ultimate consumer are afforded very little protection by a bond, for the reason that it is not practicable for small shippers to enforce their rights thereunder, and ultimate consumers, who are not shippers, have no such rights. And ultimate consumers and small shippers are, in the aggregate, the persons most affected by rate increases, especially increases in class rates.

IV.

THE ORDER OF THE BOARD OF RAILROAD COMMISSIONERS OF THE STATE OF NORTH DAKOTA DATED MAY 8, 1929, WILL NOT RESULT IN AN UNLAWFUL BURDEN UPON INTERSTATE COMMERCE.

The appellants claim that this case involves purely a question of jurisdiction. It is not a question whether the court, in a case of which it has jurisdiction, may issue an injunction pendente lite. If this were a case involving alleged confiscation we should not upon appeal question the power of the court below to grant the injunction. The question here, however, is whether the federal courts have jurisdiction to entertain in any form an application which seeks to enjoin the enforcement of intrastate rates prescribed by state authority, and not alleged to be confiscatory, merely because there is pending before the Interstate Commerce Commission a proceeding in which action may be taken which will affect the relationship of such intrastate rates to interstate rates. If, however, consideration should be given to the reasonableness of the intrastate rates, enforcement of which has been restrained by the injunction, the evidence in the record does not justify the injunction.

The affidavits presented to the lower court and made a part of this record are conflicting. We believe that an examination of these affidavits discloses that the great weight of fact presented indicates that no burden would be cast upon interstate commerce by the schedule of rates prescribed by the order of the state commission. We do not rest our contention, however, alone upon the preponderance of fact set forth in the affidavits. The Interstate Commerce Commission has taken notice of the extremely high rates of North Dakota interstate traffic that exist at the present time. In Investigation and Suspension Docket No. 3018, 144 I. C. C. 487 on page 490, the Interstate Commerce Commission said:

> "Intrastate class rates in North Dakota are higher than in the neighboring States of Minnesota, Nebraska, Iowa, and Wisconsin, and in South Dakota, east of the Missouri

River. Taking the average of the first four classes for 100 miles and letting the North Dakota rates represent 100 per cent, the percentages for the other States in the order named would be 70.1, 80, 55.6, 75.7, and 84.6 per cent. The record does not show what the relationship would be to the rates in the remainder of South Dakota, or in Montana or Wyoming."

A mere difference in level between state and interstate rates does not warrant the interference of the Interstate Commerce Commission. **Railroad Commission of Wisconsin et al v. Chicago, Burlington & Quincy Railroad Co.**, 257 U. S. 563, 66 L. ed. 371. If a mere difference in level of rates does not warrant interference by the Interstate Commerce Commission, whose statutory duty it is to consider such matter, then much less does such a condition warrant interference by the courts on the mere possibility that the Interstate Commerce Commission might at some later time find that discrimination against interstate commerce existed.

The Interstate Commerce Commission itself has discussed this same principle in **Ohio State Rates on Sand, Gravel, etc.**, 85 I. C. C. 66, 75, wherein it is stated: "The law does not require that intrastate rates shall be maintained on the exact level of interstate rates, but only that there shall not exist between the two a disparity so substantial as to operate as a real discrimination against and obstruction of interstate commerce." (See also **Rates and Minimum Weights on Salt Within the State of Ohio**, 128 I. C. C. 499, 504.)

V.

THE PLAINTIFFS HAD AT THE TIME OF THE COMMENCEMENT OF THIS ACTION A PLAIN, ADEQUATE AND COMPLETE REMEDY AT LAW IN THE COURTS OF THE STATE OF NORTH DAKOTA.

Public Utilities Act of the State of North Dakota (Chapter 192, Session Laws N. D. 1919) provides for a judicial review upon both law and facts of all orders made by the Board of Railroad Commissioners fixing, establishing or changing rates. **State ex rel Hughes vs. Milhollan et al.**, 195 N. W. 292.

CONCLUSION

In conclusion, it may be said that while this case presents to this Court certain concrete questions of law, from the point of view of the North Dakota Commission, and of all state regulatory authorities, it presents the practical question whether the cooperative plan, contemplated by paragraph (4) of Section 13 of the Interstate Commerce Act, and brought into existence in the manner which has been set forth in this brief, shall be permitted to operate. Are the acts of state authorities—notwithstanding the full recognition by such authorities of their obligations under federal law, and notwithstanding complete cooperation by them with the Interstate Commerce Commission, through which Congress exercises its dominant power—subject to injunction by the federal courts without any adjudication by the Interstate Commerce Commission that any act done or proposed to be done by state authority will interfere in any way with federal regulation of interstate commerce, or in any manner injure such commerce?

Respectfully submitted,

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